

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

HUMANA INC. *and* AMERICANS FOR
BENEFICIARY CHOICE,

Plaintiffs,

v.

U.S. DEPARTMENT OF HEALTH AND
HUMAN SERVICES, *et al.*,

Defendants.

No. 4:24-cv-1004-O

**PLAINTIFFS' UNOPPOSED MOTION FOR LEAVE TO FILE
NOTICE OF SUPPLEMENTAL AUTHORITY**

Pursuant to Local Rule 56.7, plaintiffs Humana Inc. and Americans for Beneficiary Choice respectfully move for leave to notify the Court of the Supreme Court's recent decision in *FCC v. Consumers' Research*, No. 24-354. The slip opinion is attached.

Consumers' Research concerned the Communications Act, which requires the FCC to collect contributions from telecommunications companies to subsidize universal service. *See* slip op. 4-7. To help FCC calculate and collect contributions, the agency appointed Universal Service Administrative Company (USAC). *Id.* *Consumers' Research*, a carrier subject to the surcharge, argued that Congress unlawfully delegated its legislative power to the FCC to establish the contribution scheme; and that the FCC, in turn, unlawfully delegated its executive power to USAC to calculate contributions. The Fifth Circuit initially sustained both challenges, but the Supreme Court reversed.

Plaintiffs in this case have not raised a claim of unlawful delegation from Congress to CMS, so the portion of the Supreme Court's opinion addressing legislative non-delegation doctrine is not relevant. But they *have* raised a claim that CMS unlawfully delegated

its regulatory authority to Hendall, Inc. (and Hendall's subcontractor, AIR) with respect to the Star Ratings system, in violation of the private non-delegation doctrine. *See* Plaintiffs' MSJ (Dkt. 35), at 28-32, 35-37; Plaintiffs' MSJ Reply (Dkt. 41), at 30-36.

On that front, *Consumers' Research* does not change the legal landscape in any outcome determinative way. In rejecting the private non-delegation claim there, the Supreme Court noted that USAC merely "makes recommendations" for financial contributions to a government fund, based on simple "arithmetic." Slip op. 32-33. USAC does not engage in "policy-making" on behalf of the FCC, and none of USAC's projections has any effect until the FCC "endorses" and "formally promulgates them." *Id.* at 32-33.

Not so here. Under the Star Ratings system, AIR places test calls, independently evaluates those calls for regulatory compliance (AR60), and exercises its own judgment as to whether any calls should be invalidated (AR23). This is no mere "transfer of accounting functions." Slip op. 34. And AIR *does* engage in third-party policy-making—as relevant here, it adopted the no-callback rule (AR23), which CMS accepted as given (AR33). Thus, unlike USAC in *Consumers' Research*, Hendall and AIR are not "working within [CMS's] rules" (slip op. 34) but rather creating those rules on the agency's behalf. That is a straightforward private non-delegation violation, even under *Consumers' Research*.

July 2, 2025

Respectfully submitted,

/s/ Michael B. Kimberly

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CERTIFICATE OF CONFERENCE

Undersigned counsel certifies that, on June 30, 2025, he conferred by telephone with Andrea Hyatt, who is counsel for defendants, regarding plaintiffs' intention to file this motion. Ms. Hyatt conveyed the defendants' consent.

/s/ Michael B. Kimberly

CERTIFICATE OF SERVICE

Undersigned counsel certifies that a true and correct copy of this document was served via CM/ECF on all counsel of record on July 2, 2025.

/s/ Michael B. Kimberly